

# MISSISSIPPI DIVISION OF MEDICAID

## Eligibility Policy and Procedures Manual

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#### **304.01.05L TYPES OF TRANSFER OF ASSETS**

The situations listed below are considered transfers of assets and may be subject to a penalty period for institutionalized and Home and Community Based individuals.

##### **Treatment of Income as an Asset**

Income, in addition to resources, is considered to be an asset for transfer (and trust) purposes. Thus, when an individual's income is given or assigned in some manner to another person, such a gift or assignment can be considered a transfer of assets for less than fair market value.

In determining whether income has been transferred, do not attempt to ascertain in detail the individual's spending habits during the look back period. Absent some reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of daily living.

However, you should attempt to determine whether the individual has transferred lump sum payments actually received in a month. Such payments, while counted as income in the month received for eligibility purposes, are counted as resources in the following month if they were retained. Disposal of such lump sum payments before they can be counted as resources could constitute an uncompensated transfer of assets.

Also attempt to determine whether amounts of regularly scheduled income or lump sum payments, which the individual would otherwise have received, have been transferred. Normally, such a transfer takes the form of a transfer of the right to receive income. For example, a private pension may be diverted to a trust and no longer paid to the individual.

When a single lump sum is transferred (i.e., a stock dividend check is given to another person in the month in which it is received by the individual), the penalty period is calculated on the basis of the value of the lump sum payment.

When a stream of income, (i.e., income received in a regular basis, such as a pension) or the right to a stream of income is transferred, calculate the penalty period as you would for a lump sum. Using this method, a penalty period is imposed for each income payment.

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#### **Treatment of Income As An Asset (Continued)**

When the transfer involves a right to income (as opposed to periodic transfer of income the individual owns) make a determination of the total amount of income expected to be transferred during the individual's life, based on an actuarial projection of the individual's life expectancy, and calculate the penalty on the basis of the projected total income.

#### **Conveyance for Less than Fair Market Value**

Giving away or conveying an asset for less than fair market value within the look back period for an institutionalized or HCBS individual may be considered a transfer of assets.

#### **Waiving an Inheritance or Other Entitled Benefit**

Refusal to accept an inheritance or refusal to take legal action to obtain benefits an individual is entitled to receive may be considered a transfer of assets.

#### **Annuities When Expected Returns Are less than Cost of Annuity**

Establishing or purchasing annuities in which anticipated payments based on life expectancy of the individual are less than the cost of the annuity. The policy on annuities is explained in detail on previous pages.

#### **Irrevocable Burial Contracts Under Certain Circumstances**

An irrevocable burial contract or similar device established by the funeral home/director is considered a transfer of assets if the cost to the individual or spouse exceeds the value of the merchandise and/or services. The specialist will obtain an itemized statement to assist in determining whether the costs are commensurate with the value of the merchandise and/or services.

#### **Transfers by a Spouse**

Transfers made by the Community Spouse (CS) will create a penalty for the Institutionalized Spouse (IS). Transfers by the CS after the IS has been determined eligible will also create a penalty for the IS.

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#### **Transfers by a Spouse (Continued)**

If the CS becomes institutionalized and applies for Medicaid during the penalty period, the penalty must be apportioned between both spouses. However, if the IS has already served the penalty in full, it will not be applied a second time. If one member of the couple should leave the facility or die, the remaining portion of the penalty must be served by the remaining institutionalized spouse.

#### **Transfers of Jointly-Held Assets**

In the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset (or the affected portion of such asset) shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

Under this provision, merely placing another person's name on an account or asset as a joint owner might not constitute a transfer of assets subject, of course, to the specific circumstances of the situation. In such a situation, the individual may still possess ownership rights to the account or asset and thus have the right to withdraw all of the funds in the account or possess the asset at any time.

Thus, the account or asset is still considered to belong to the individual. However, actual withdrawal of funds from the account or removal of the asset by the other person removes the funds or property from the control of the individual and so constitutes a transfer of assets.

Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (e.g., the addition of another person's name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets.

Use regular Medicaid rules to determine what portion of a jointly held asset is presumed to belong to an applicant or recipient. This portion is subject to a transfer penalty if it is withdrawn by a joint owner.

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#### **Personal Service Contracts**

A personal service contract should be a written contract between the recipient/applicant and the personal services provider. The contract should be executed prior to the date any payments have been made to the provider. If payments have been made prior to the date of the contract these payments should be considered as transfers.

Once an individual begins receipt of Medicaid Long Term Care (LTC) services, the individual's personal and medical needs are considered to be met by the LTC provider. Payments to other individuals for services received after the individual enters LTC are considered an uncompensated transfer for Medicaid purposes.

The contract should be very specific as to the services to be provided and the payment to be paid for the services. Each service/duty should be listed with the number of hours for each service with the amount charged for each service. If the contract calls for a payment of a specific amount per hour, this amount should be reasonable. For example, nursing charges will not be allowed for non-nurses and CPA charges will not be allowed for persons who are not CPA's. Documentation of the services performed and the number of hours for each service should be submitted. All charges will be evaluated based on usual and customary charges for services in the community.

The contract must not provide for payment of compensation for future services. All payments should be made only as the services are actually rendered. Any payments made for future services should be considered as transfers. Contracts indicating a prior date but no payments have ever been made should be questioned as to why the payments for services were not made when the services were performed. This type of arrangement indicates services were provided for free. Services provided for free are not under obligation to be paid at a future unknown date.

#### **Legal and/or Professional Fees Associated with Qualifying for Medicaid**

Retaining an attorney in order to assist a family with the Medicaid application process is anyone's right. There may be instances where a family is in need of legal services to draw up various legal documents that are needed in association with the long term institutionalization of an elderly or disabled individual. However, many times these documents are either non-allowable, of no benefit to the applicant or are not required as part of the Medicaid application.

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#### **Legal and/or Professional Fees Associated with Qualifying for Medicaid (Continued)**

The Division of Medicaid does not impose a limit on the amount of fees an attorney may charge a family; however, there is a limit on the legal fees associated with preparing documents in the spend-down process of an applicant's resources. The limit can also be applied to non-lawyers, but only those whose business it is to advise the elderly and disabled about Medicaid. If it cannot be determined that the person charging the fee has a business or represents a business that does Medicaid planning, the fee will be considered as a transfer. The following instructions will address two (2) separate fees or contracts:

- **Professional Fees Associated with Filing a Medicaid Application**

A capped fee of \$2,000.00 is allowed for professional services incurred for assisting in the Medicaid application process. This maximum amount takes into consideration the estimated time of completing a Medicaid application, appearing with the individual for the in-person interview and assisting with the necessary documentation needed to apply. This fee also includes involvement with any appeal process that may be necessary.

This capped fee is applicable to the applicant and his/her spouse for expenses paid from their funds and does not attempt to set a maximum fee that can be charged to other family members that do not include the applicant or his/her spouse. When evaluating the spend-down of excess resources for an applicant, only \$2,000.00 will be allowed from the applicant's resources. Amounts paid in excess of the capped fee will be treated as a transfer of resources in order to qualify for Medicaid.

**NOTE:** Conservatorships are a separate legal process and as such, may not be subject to the \$2,000 cap on professional fees. When needed, review conservatorships on a case-by-case basis to determine if fees and associated costs in excess of the capped fee are reasonable.

- **Legal Fees Associated with Preparing a Trust**

A copy of any trust agreement must be submitted for review along with the amount charged for preparing the trust. The attorney must explain how the trust benefits the Medicaid applicant or recipient in order for the Division of Medicaid to make a decision on whether the charge is allowable. It is only the legal fee that will be evaluated based on the benefit the trust provides. The terms of the trust itself will be evaluated using Medicaid's trust and transfer policy.

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### **Legal Fees Associated with Preparing a Trust (Continued)**

If Medicaid determines that the trust benefits the Medicaid applicant or recipient from a Medicaid perspective, a capped fee of \$1,500.00 is allowed for preparing the trust document. Income Trust documents are subject to a lesser cap of \$500.00 since the Division of Medicaid provides a model trust agreement for this provision. Fees paid from the applicant's money which are above the capped limit will be treated as a transfer of resources.